

Before the
Federal Communications Commission
Washington, D.C. 20554

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In re Applications of)
HEIDI DAMSKY) MM Docket No. 90-638
WEDA, LTD.) File No. BPH-880816MW
HOMEWOOD PARTNERS, INC.) File No. BPH-880816NR
For a Construction Permit for a New)
FM Station on Channel 247A in)
Homewood, Alabama) File No. BPH-880816NU
)

TO: The Full Commission

**REPLY TO "OPPOSITION TO FURTHER PETITION TO ENLARGE ISSUES
AND TO REMAND FOR FURTHER HEARING PROCEEDINGS"**

Heidi Damsky ("Damsky"), by her attorney, hereby respectfully replies to the "Opposition to Further Petition to Enlarge Issues and to Remand for Further Hearing Proceedings", filed in this proceeding by Homewood Radio Co., L.L.C. ("HRC"), on August 18, 1998. In reply thereto, it is shown:

1. In its Opposition, HRC relies upon the "cyanide pill" defense. It advances a long string of specious legalistic arguments in a vain and futile effort to explain why it did not violate the

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ex parte rules, but attaches statements from its principals claiming that the attorneys who violated those rules did so without consulting with their clients. Thus, HRC asks the Commission to absolve it of any responsibility for the violation, because the attorneys allegedly committed the violation without the knowledge of their principals and have dutifully taken the required cyanide pills.

2. All of this is almost laughable. At footnote 5 of its Opposition, HRC argues that John Riffer was not a "decision-making personnel", and cites Freeman Engineering Associates, Inc. v. F.C.C., 103 F.3d 169 (D.C. Cir. 1997) for the broad proposition that "ex parte presentation is not even relevant to ultimate qualifications if it does not reach the ultimate decision maker". As usual HRC overstates the law. In Freeman, a written ex parte presentation was sent to the FCC, questioning the feasibility of some technology developed by a company called QUALCOMM. The Court of Appeals observed that "the ex parte contact was quite serious in that the August Report contained a direct attack on the feasibility of QUALCOMM's proposed technology." 103 F3d at p. 184. However, the Court concluded that the improper ex parte communications was harmless because, "In its Third Report and Order, the Commission reached the exact opposite conclusions, explicitly finding that QUALCOMM's 'equipment appears viable for the provision of PCS services'. 9 F.C.C.R. at 1370, P 266. As a result, we conclude that the Report did not taint these proceedings". 103 F.3d 169, 184.

3. Here, John Riffer was the Commission official in charge of preparing a decision on Damsky's Motion for Stay. If, as HRC now argues, Riffer played no part in the decision to issue the construction permit, the question arises as to just why Messrs. Gavin and Garziglia decided to meet with Riffer. Was the purpose of the meeting to discuss the weather or their golf scores? Obviously not. Obviously, the purpose of the meeting was to enlist Mr. Riffer's support in getting

the Mass Media Bureau to issue the construction permit, notwithstanding the existence of the Motion for Stay. Obviously, also, Gavin and Garziglia thought that Mr. Riffer either had the authority to make a decision in their favor, or influence others to make such a decision.

4. Rainbow Broadcasting Company, 1998 WL 439356, heavily relied upon in the Opposition, really furnishes no comfort to HRC. In Rainbow there was an ex parte contact from an attorney in a contested proceeding, involving an extension of a TV construction permit. The Commission whitewashed the matter but, on appeal, the U.S. Court of Appeals for the D.C. Circuit, remanding the case for a full hearing. Press Broadcasting Co., Inc., v. FCC, 59 F.3d 1365 (D.C. Cir. 1995). After a full hearing was held and only after a full hearing was held, the Commission concluded that there was, in fact, an improper ex parte communication, but that the communication was not so serious as to warrant absolute disqualification. Nonetheless, the Commission strongly admonished those involved in the violation. Rainbow at para. 16.

5. Here, there has been no hearing to determine the facts and circumstances surrounding this improper ex parte presentation. At minimum, a hearing is needed to get the facts. David Ortiz Radio Corporation v. FCC, 941 F.2d 1253 (D.C. Cir. 1991) and Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220 (D.C. Cir. 1993). Further inquiry is needed, for example, to find out exactly what inspired Messrs. Gavin and Garziglia to approach Mr. Riffer if, as it is now claimed, they never told their clients what they were going to do.

6. On its face, it looks as if two experienced communications lawyers, knowing exactly what they were doing, tried unsuccessfully to enlist a high Commission official to engage in a highly improper discussion of the merits of a pleading which was before him for a decision. That is a very serious matter, indeed. It is serious because the private attorneys made a

representation to the Commission official that the ex parte rules did not apply -- a representation that they must have known to be false. It is made more serious because, in the Opposition, signed by both attorneys, there is no flat denial that they knew that the approach was improper.¹ It is made even more serious by the fact that this is not the first instance in which attorneys for HRC or its predecessors in interest have engaged in sleazy and unethical behavior. There was the time when these attorneys wrote a letter to Heidi Damsky's local counsel, without sending a copy of the letter to her communications counsel of record, urging her to dismiss her application and presenting local counsel with extensive arguments, documented with extensive references to FCC cases, in an effort to persuade Damsky to dismiss.² There was the time when counsel for HRC had the chutzpah to attack Damsky for questioning the honesty and integrity of Homewood Partners, without mentioning that in his own Exceptions, filed on behalf of WEDA, Ltd., before WEDA, Ltd. and Homewood Partners merged, counsel for HRC did exactly the same thing.³

7. Subsequent, to the meeting with Mr. Riffer, the FCC staff did, in fact, break long-established policy by issuing a construction permit to HRC, notwithstanding the pendency of Damsky's Motion for Stay. Damsky has applied for a review of the staff action by the full Commission. In the meantime, she is entitled to a hearing on the ex parte issues which she has requested. Ortiz and Weyburn, cited, supra.

¹In contrast with the situation in Rainbow, where the attorney who made the improper approach insisted that she thought it was not improper, and at least had some basis (however implausible) for that insistence.

²See, Petition to Enlarge Issues and to Remand for Further Hearing Proceedings, filed by Damsky under date of July 10, 1997.

³See, Reply to Consolidated Opposition to Petition for Reconsideration and Request for Stay, at para. 19, filed by Damsky under date of June 22, 1998.

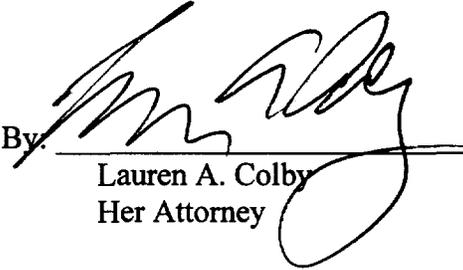
WHEREFORE, it is respectfully requested that the issues be enlarged as requested,
to permit a full hearing on the facts and circumstances surrounding this entire matter.

Respectfully submitted,

August 26, 1998

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 26th day of August, 1998, to the offices of the following:

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